

| ATTORNEY GENERAL'S OFFICE                          |   |
|--|---|
| INITIALS: <i>AK</i>                                | DATE: <i>01/10/21</i>                       |
| <input checked="" type="checkbox"/> File           | <input checked="" type="checkbox"/> Website |
| <input checked="" type="checkbox"/> Database       | <input type="checkbox"/> Social Media       |
| <input checked="" type="checkbox"/> Email internal | <input type="checkbox"/> _____              |

IN THE COURT OF APPEAL  
LAND JURISDICTION  
NUKU'ALOFA REGISTRY

|                               |                               |
|-------------------------------|-------------------------------|
|                               | AC2 of 2021<br>[LA 7 of 2020] |
| BETWEEN:                      |                               |
| <b>HSH PRINCE TUNGI</b>       | <b>Appellant</b>              |
| AND                           |                               |
| <b>VILIAMI 'ETUATE NAPA'A</b> | <b>First Respondent</b>       |
| <b>MINISTER OF LANDS</b>      | <b>Second Respondent</b>      |
| <b>MALAKAI NAPA'A</b>         | <b>Third Respondent</b>       |

|                               |                               |
|-------------------------------|-------------------------------|
|                               | AC3 of 2021<br>[LA 7 of 2020] |
| BETWEEN:                      |                               |
| <b>MALAKAI NAPA'A</b>         | <b>Appellant</b>              |
| AND                           |                               |
| <b>MINISTER OF LANDS</b>      | <b>First Respondent</b>       |
| <b>HSH PRINCE TUNGI</b>       | <b>Second Respondent</b>      |
| <b>VILIAMI 'ETUATE NAPA'A</b> | <b>Third Respondent</b>       |

Coram: Whitten CJ  
Hansen J  
Randerson J  
White J

Counsel: ✓ Mrs P Tupou for HSH Prince Tungi  
Mr S Sisifa for Minister of Lands  
Ms A Kafoa for Malakai Napa'a  
Viliani 'Etuete Napa'a self-represented

Hearing: 22 September 2020

Judgment:

*Received.*  
*SA 11/10/21*

## JUDGMENT OF THE COURT

1 These appeals concern the validity of a grant of a town allotment by the Minister of Lands to Mr Malakai Napa (Malakai). It is called Toafa. The allotment is part of the hereditary estate of Prince Tungi.

2 The principal respondent to both appeals is Mr Viliami 'Etuata Napa'a (Viliami). He was the plaintiff in the proceedings below in the Land Court.

3 On 16 December 2020 Niu J (sitting with Assessor Tu'ifua) upheld Viliami's challenge to the grant. His Honour ordered:

- (1) The claim of the plaintiff is upheld.
- (2) The first defendant, Minister of Lands, shall forthwith cancel the deed of grant book 464 folio 27 dated 2 March 2020 of the third defendant.
- (3) The plaintiff shall sign and lodge an application form for the town allotment which was granted to the third defendant in the deed of grant book 464 folio 27 with the Minister of Lands and it is hereby declared that the estateholder, Noble Tungi, is deemed to have consented and that there is no impediment to the grant of the allotment to the plaintiff.
- (4) The plaintiff shall pay all fees and charges which shall properly be required for the grant and registration of the town allotment in his name.
- (5) The Minister of Lands shall cause a deed of grant of the town allotment to be prepared and to be duly issued to the plaintiff and to have it registered according to law.
- (6) There be no order as to costs in respect of these proceedings.

*(Viliami 'Etuata Napa'a v Minister of Lands & Ors LA 7/2020).*

- 4 Both Prince Tungi and Malakai appeal from those orders. The Minister of Lands defended the claims made by Viliami in the Land Court but made no submissions on appeal.
- 5 The town allotment in question is at Fua'amotu. It is 30 perches in area and is numbered as Lot 220. On 4 January 1929, Mr Sione Napa'a (Mr Napa'a) was registered as the holder of the allotment (J [3]).
- 6 Mr Napa'a and his wife died in 1997 (J [11]). They had no children.
- 7 Viliami was born in 1969. He is the illegitimate son of an illegitimate daughter of a sister of Mr Napa'a's wife (J [2]). Malakai is the great-grandson of a sister of Mr Napa'a. Malakai's father (Mr Kolo ki Pangai Napa'a (Kolo)) was raised as a child of Mr Napa'a and his wife.
- 8 Viliami was also raised as their child. Viliami was formally adopted by a grant of Letters of Adoption by the Supreme Court on 15 March 1974 to Mr and Mrs Napa'a. The effect of the adoption was that Mr and Mrs Napa'a had the legal role of guardian of Viliami but he did not thereby become their legitimate son (*Maintenance of Illegitimate Children Act*, ss 15-19).
- 9 Neither Viliami, nor Malakai, nor anyone else, was entitled to succeed to Mr Napa'a's town allotment as his heir (*Land Act*, s 82).
- 10 Thus on Mr Napa'a's death in 1997 the town allotment reverted to the holder of the hereditary estate (*Land Act*, ss 82(g), 83). At that time the holder of the hereditary estate was His Majesty King Taufa'ahau Tupou IV (J [11]).
- 11 It was open to the Minister of Lands on application by a qualified applicant to grant the town allotment to the qualified applicant after consultation with the holder of the hereditary estate (*Land Act*, ss 8, 43). Both Viliami and Kolo reside on the hereditary estate. Malakai is a resident of New Zealand (J [84]).
- 12 Neither Mr and Mrs Napa'a, nor the children they raised, lived permanently on the town allotment. Viliami gave evidence that he sometimes slept in a shelter

constructed in about 2004. The shelter was destroyed by a hurricane about two years later (J [21]).

13 Mr Napa'a held two tax allotments of 4 acres and 8 acres. The primary judge found that in about 1979 Mr Napa'a told Viliami that the 4 acre tax allotment was to be Kolo's tax allotment and the 8 acre tax allotment was to be Viliami's tax allotment (J [7]).

14 The primary judge found that from the late 1980s Viliami and his mother and siblings regularly cut and cleaned the town allotment.

15 Viliami married in 1995. The primary judge found that in that year Mr Napa'a prepared a paper addressed to the King stating that he wished to surrender his tax allotment in order that it be granted to Viliami. The letter was not sent. His Honour also found that Mr Napa'a told Viliami and his wife to maintain the allotment as theirs and to have their own house built on it. (J [11]).

16 The primary judge found that Kolo had applied to the King for the 8 acre tax allotment which Mr Napa'a had promised to Viliami. When Viliami learnt of this, he went to the Palace office with the paper written by Mr Napa'a, as a result of which the consent to Kolo's application for the 8 acre tax allotment was cancelled and that allotment was subsequently granted to Viliami.

17 The primary judge also made the following findings which Prince Tungī and Malakai dispute:

"[15] When Viliami's application for the tax allotment was given to the District Officer, Henele Nai, to be forwarded to the Palace Office for the signature of Tungī, Viliami also attached his application for the town allotment Toafa, because the representative of Tungī, 'Ahome'e, had told him to forward his application for the town allotment as well.

[16] In the following week, when asked by Viliami, Henele Nai told him that he had not given 'Ahome'e the application for the town allotment because there was no difficulty with the town allotment and that he would take it over later.

[17] Viliami followed up and asked Henele Nai about his application for the town allotment and Henele Nai told him that he had already given it to the

Palace Office and for him to just wait for it. Henele subsequently left for New Zealand and has not returned.

[18] Viliami then went to the Palace Office himself and saw a lady who had replaced 'Ahome'e as the representative. She instructed him and he lodged a second application with her for the town allotment and when he checked up with her it could not be found and he lodged a third application and when he went to check it up, the lady was no longer there and the application could not be found.

[19] He then went with another application to the new representative, Afu Taumoepeau, but again the same thing happened. He lodged yet another application but with the same result. That carried on from 2001 to 2018."

- 18 Viliami did not produce copies of the applications for the town allotment he said he had made. The Senior Land Registrar of the Ministry of Lands, Mr Semisi Moala, gave evidence that the department had never received such an application. The primary judge so found (J [60]).
- 19 Viliami continued to keep the town allotment cut and cleaned (J [20]).
- 20 In 2004 Viliami paid \$500 towards the cost of the construction of a concrete water tank on the allotment (the balance being provided through aid provided by the Canadian government). He built a shelter that was destroyed about two years later by a hurricane (J [21]). In 2011 Viliami allowed the village police to construct a house on the allotment for their use but later withdrew that consent and they moved and rebuilt the house elsewhere (J [22]).
- 21 Viliami conducted various improvements to the property, including the construction of breadfruit trees and fencing with tanetane hedges (J [23]).
- 22 The primary judge found that Viliami had repeatedly gone to see representatives of the estate holder about his application for the town allotment from 1998 to 2018 and that in 2019 he saw a Mr Seli Toufa at the Lands Office about that (J [59]).
- 23 Viliami's evidence was that he gave a letter of application for land registration to Seli, who returned it to him.

24 On 27 September 2019, Kolo attended the Lands Office to register his 4 acre tax allotment and was then told that Mr Napa'a's town allotment had still not been registered in anyone's name, although it had reverted to the estate holder 20 years previously. The primary judge found that Kolo said that he was surprised about that because he thought that Viliami had had it registered when he had the 8 acre tax allotment registered in his name in 1998 (J [26]). Kolo's evidence was that when he attended the Lands Office to register his tax allotment, he noticed a map of the town allotment and asked to whom it belonged. He was told that it belonged to Sione Napa'a and learned that nothing had been done about the allotment. He then submitted his application for it. He told the Lands Office that Mr Napa'a was his grandfather and that he was adopted. He was provided with an application form to be completed by the Noble, and was told that if the Noble signed it he should bring it back to be completed by the Ministry of Lands.

25 On the same day an application was filled out by someone in the Lands Office for the grant of the town allotment to Malakai (J [29]). The application was signed by Kolo.

26 The application form included the following note:

"Kolo ki Pangai states that this is Sione Napa'a's allotment that he had registered which is his real uncle and that he was adopted by Sione Napa'a as he did not have a wife or children. This was the reason he was adopted by Sione Napa'a which was in order to inherit the allotment for himself and his children. Kolo ki Pangai Napa'a is the adopted son of Sione Napa'a and his son is making application."

27 The statement that "the reason Sione Napa'a adopted him (Kolo) was so that he and his children would own the allotment" appears to be information given by Kolo to Sione Vele of the Lands Office. The primary judge so found. On the primary judge's findings that statement was false, Kolo denied that he said what was recorded but the primary judge did not accept his denial (J [30]).

28 In his brief of evidence Kolo stated:

"I was directed to Sione Uele (an employee at the Ministry of Land), he asked about my relation to Sione Napa'a and I explain to him these exact words, 'Sione Napa'a is my father's uncle, my father's name is 'Onetaka 'Ofa. Sione Napa'a adopted myself because he didn't have a children with his wife.' Mr Uele then asked about the relation of Viliame 'Etuata Napa'a to Sione Napa'a. 'Viliami Napa'a is an illegitimate child of Toakase. Toakase was an illegitimate daughter of Tina. Tina was adopted together with myself by Sione and 'Ana Napa'a'."

29 The primary judge concluded that both Mr Toufa and Mr Uele knew of Viliami and that he had a connection to the estate. (J [63]); that Mr Toufa knew that Malakai was applying for the same allotment about which Viliami had seen him (J [64]); and that neither informed Viliami about Malakai's application (J [64]).

30 On 6 December 2019 Prince Tungi consented to the application.

31 The primary judge summarised the investigations made by the Ministry of Lands as follows:

"[36] An inspection of the town allotment was carried out by two officers, Pelela Tokelau and Seli Toufa in February 2020, and the report thereof stated that the allotment was "vacant". It also stated that Kolo was interviewed during the inspection and that he stated that "Sione Napa'a did have a house on the allotment in which they lived but that it was blown down during Cyclone Gita and that they moved to another allotment until they could build a new house on the allotment". The report also stated: "The floor of the house is still showing and this allotment is available".

[37] A briefing paper was submitted to the Minister and it was signed by the inspection officer on 10 February 2020. It stated, inter alia, "Subject land was registered on 04.01.1929 by Sione Napa'a and he passed away on 5.04.1997 without any claim, Sione Napa'a never married nor children the land revert back. The estateholder consent 06.12.2019". It also stated that the survey fee had been paid on 9 December 2019. It also stated that the site inspection result was that the allotment was "vacant" and it recommended that the application be granted and that an attached draft instruction be signed. The Minister signed both his approval of the recommendation and of the instruction on 14 February 2020.

[38] The instructions were that the deed of grant of the applicant, Malakai, be prepared for registration. The deed was then prepared and the Minister signed and registered it on 2 March 2020 and Kolo signed the receipt of that deed on 3 March 2020.

[39] A photograph had been taken by the inspection officer of the allotment on the day of his inspection and it was produced in evidence together with all the documents of the first defendant Minister. It showed the 3 breadfruit trees

which Napa'a had planted and the concrete water tank that Viliami had built as well as the concrete floor slab of the house which the village police had built, on the allotment. It also showed that the allotment was kept maintained and free of bush. It also showed the abandoned foundation which was built to be the toilet to be used by the village police. It also showed the tanetane hedge which Viliami had planted to fence the allotment."

32 The primary judge also found in relation to the inspection report:

"[69] ... The report is a printed form with 9 items to be filled in by the inspection officer. Item no. 7 lists 8 things which must be noted by the officer and they are as follows:

'Buildings/house  
Fence  
Other improvements  
Vegetation  
Utilities  
Landfill  
Development of adjacent land  
Sketch map.'

Not one item was ticked and yet the photograph (P.12) shows the 3 breadfruit trees, the concrete water tank, the concrete floor slab of the house the village police had built there, the tanetane hedge, the toilet floor slab, and lack of bush or vegetation or long uncut grass.

[70] Item 9 is "Interview" and where it says "name" it says "Kolo ki Pangai Napa'a" (father of the applicant) and where it says comments it says: "Sione Napa'a did have a house on the allotment in which they lived but that it was blown down during Cyclone Gita and that they moved to another allotment until they could build a new house on the allotment". That to me means that Kolo was interviewed by the officer when he made his inspection of the allotment and I therefore do not accept Kolo's evidence that he was not there when the inspection of the allotment was carried out.

[71] Item 10 is "Observation" and the officer has written: "The floor of the house is still showing and the allotment is available".

[72] It is clear and I find that Kolo had materially misrepresented the history and upkeep of the allotment to the inspection officer so much that the officer was not aware that it was the plaintiff who had kept the allotment maintained in all the years from at least 1990 up to 2020, and that it was the plaintiff who was in actual possession and control of the allotment and that it was him who had built the concrete water tank on it.

[73] I find that that misrepresentation is consistent with the false information which I also find he also gave and which the officer at the Land Office wrote at the bottom of Malakai's application (P.1):

'Note:This allotment is said by Kolo ki Pangai to be the registered allotment of Sione Napa'a who was his real uncle and that Sione Napa'a had fostered him because he did not have a wife or children.

And that was why Sione Napa'a fostered him so that the allotment be his and his children's. Kolo ki Pangai is the foster son of Sione Napa'a and the applicant is his son.'

I believe that he himself gave that information to the officer, despite his denial in his evidence that he did not [sic] do so.

[74] I am however concerned that the officer did not think to ask some other person or persons either living next door to the allotment or nearby to ascertain whether or not the information which Kolo was telling him was true, that is, an independent person from Kolo because Kolo was the father of the applicant and was in fact the one making the application on behalf of his son.

[75] Just by looking at the photograph (P.12), I can see that the water tank is quite some distance from the floor slab of the house (which Kolo said Napa'a had built and in which they had been living). Why was the water tank built so far away from the house, when it was built to collect rainwater from the roof of the house? The toilet floor slab is also quite some distance from the house as well. Why?

[76] The officer would also have seen the concrete floor slab for the toilet which the village police had begun to build. He would have seen that the toilet was never finished. Where then had Napa'a and the family gone to go to the toilet in all the years they would have been there? The officer ought to have considered that and should have looked for any outhouse or location of such outhouse but he did not. Had he looked for it he would have found there was no such location because there was never any such outhouse on the allotment. He would there and then have correctly concluded that what Kolo had told him was untrue.

[77] The officer ought to have asked but he did not ask either Kolo or any independent person for explanation as to those things. They were glaring and they required explanation. The officer had a duty to ask for it.

[78] I therefore consider that the officer failed in his duty which was to make reasonable inquiries, in order to ascertain whether or not there was any other person who may have a claim to the allotment he was inspecting, because that was the purpose of inspecting an allotment, such as he was doing."

- 33 Kolo gave evidence that he and Mr Napa'a planted the breadfruit trees, but the primary judge preferred the evidence of Viliami.
- 34 On these findings the primary judge was justified in concluding that officers of the Lands Office knew that Viliami sought to claim the town allocation for himself, had failed to give Viliami a fair opportunity to be heard and had failed to consider his competing claim. Unless the findings should be overturned, the

grant to Malakai should be set aside irrespective of the other challenges to the primary judge's findings.<sup>1</sup>

35 The primary judge accepted that Viliami had not lodged an application for a grant of the town allotment with the Lands Office (J [60]). Mrs Tupou, who appeared for Prince Tungi, and Ms Kafoa, who appeared for Malakai, submitted that because Viliami had not done so, he was not entitled to be heard in opposition to the application made by Malakai.

36 We do not agree. No authority was cited for that proposition. Order 6 r 1(4) of the Land Court Rules provides that so far as practicable the recognised principles of judicial review shall apply to any action where the relief claimed arises out of the exercise by an individual of a decision-making power under the *Land Act*.

37 Those recognised principles include a requirement that a person whose rights, interests or legitimate expectations would be directly and adversely affected by the decision, be given the opportunity to be heard. On the judge's findings Viliami had a legitimate expectation to a grant and had attempted to make the requisite application.

38 The appeal is by way of rehearing on the documents (Court of Appeal Rules, o 8 r 1). The primary judge had the advantage of seeing and hearing the witnesses. His findings should only be set aside if it is shown that he palpably misused that advantage. Unless the findings are contrary to clearly demonstrated objective facts, or uncontested testimony, or are glaringly improbable, or contrary to compelling inferences, they should not be set aside on appeal.<sup>2</sup>

39 The primary judge was entitled to accept Viliami's evidence of the enquiries he made at the Lands Office and that its officers were aware of his claim to

---

<sup>1</sup> *Hakeai v Minister of Lands* (1996) Tonga LR 142; *Cocker v Palavi & Minister of Lands* (1997) Tonga LR 203; *Tafa v Viau* (2006) Tonga LR 113; *To'a v Toumoepeau and Minister of Lands* [2015] Tonga LR 62; *Manu v 'Aholelei* [2015] Tonga LR 135.)

<sup>2</sup> *Fox v Percy* (2003) 214 CLR 118; [2003] HCA 22 at [28]-[31].

the allotment. He was entitled to accept that it was Viliami, and not Kolo, who had maintained the allotment and that Kolo gave the information recorded in the Lands Office's note on the application form (J [24]), which misrepresented the position.

- 40 The misrepresentation conveyed to the Minister was that Mr Napa'a had intended that Kolo and his children should inherit the allotment. Mr Napa'a's intentions would be highly relevant to the Minister's determination. They were not as represented. Without fault on the Minister's part, but as a result of the misrepresentation conveyed by Kolo to the Lands Office, the Minister made a material mistake of fact and failed to take into account a material consideration (namely, Mr Napa'a's true intention). Whether that would itself be a ground for judicial review need not be decided.<sup>3</sup>
- 41 Mrs Tupou for Prince Tungji submitted that Viliami had no standing to bring proceedings because he was not Mr Napa'a's heir.
- 42 In his statement of claim Viliami pleaded that he had been legally adopted by Mr Napa'a as Mr Napa'a's own child in 1974. There was no dispute about this. It is clear from his evidence that Viliami considered that he thereby became the legitimate son of Mr Napa'a. (He was not legally represented at trial or on appeal.)
- 43 Viliami was in error in this understanding. That does not mean that he lacked standing to bring the claim. As the primary judge held, Viliami's claim did not depend upon his being the lawful heir to the allotment. He pleaded that the claim was brought on the basis that the Minister of Lands and Prince Tungji did not make reasonable enquiries about the availability of the land to be given to Malakai (Statement of Claim [2]; J [48]).
- 44 The real issue was not about the availability of the land for grant, but the making of adequate enquiries in respect of the competing claims to the land. That was the issue fought at trial. Viliami had standing to litigate that issue. It

---

<sup>3</sup> See *Tafa v Viau* [2006] Tonga LR 114 at [66]-[67].

would have been well open to the Minister to decline Malakai's application had Viliami been given the opportunity to make submissions in opposition to it, and had adequate enquiries been made as to Viliami's connection to the land and maintenance of it.

45 The primary judge also found that Viliami had standing because he was in lawful possession and control of the land (J [51]).

46 Mrs Tupou for Prince Tungi challenged this finding on the basis that because the land reverted to Prince Tungi's hereditary estate, Viliami did not have lawful possession of it as he did not have Prince Tungi's licence to occupy the land. It is unnecessary to consider this submission because Viliami's standing to bring the proceeding does not depend upon whether his possession and control of the land was lawful as against Prince Tungi.

47 A defence that Viliami's claim was time-barred by s 170 of the *Land Act* was not pressed. The 10 year limitation period provided by that section only commenced to run on the making of the grant to Malakai.

48 For these reasons, the primary judge correctly held that the grant of the town allotment to Malakai should be quashed and the Minister of Lands should be ordered to cancel the grant.

49 The appeal from order 2 should be dismissed.

50 The primary judge did not remit the matter to the Minister for redetermination according to law. Instead, his Honour made orders 3 to 5 quoted above.

51 The primary judge found:

"[83] ... I accept that Lord Tungi would not have agreed to grant the allotment to Malakai if Kolo had told him the correct history of this town allotment, as the plaintiff and his witnesses have stated in their evidence in this case. He has been materially misled by Kolo, as Kolo has materially misled the officers of the Minister. He should not feel obligated to Kolo for the food and wares which Kolo had presented to him in the customary way when he asked for the allotment for his son. Kolo knew that Napa'a had expressly left the town

allotment to Viliami. He did not dispute it. He accepted it and he allowed Viliami to look after it as his, at great costs to Viliami and his family, in all these years since at least 1990. It would be a grave injustice not to grant the allotment to Viliami.

...

[86] I accept the evidence of the plaintiff that he had given two application forms to the lady in "Polata'ane" who was the representative of the estate holder Tungi, and at least 2 other applications to Afu Taumoepeau (Mohulamu) who replaced that lady as the representative, and that those two representatives ought to have forwarded those applications to the estateholder and to have informed the plaintiff of the outcome of those applications but they did not. Those failures were failures of the estateholder as well because he had appointed those representatives.

[87] No suggestion was made and no reason was given by anyone during this trial that this allotment should not be granted to the plaintiff. On the contrary, there is every reason why this allotment should be granted to him. I am satisfied that had the plaintiff's applications been duly presented to his Majesty whilst he was the estateholder or to the present estateholder by the lady or by Afu Taumoepeau, the consent would have readily been granted and signed on the application form. And had that signed form been lodged with the Minister, the Minister would have readily made the grant to the plaintiff.

[88] Furthermore, I consider that the estateholder was aware that the allotment had reverted to him. He was so aware when he (His Majesty) had been asked to grant Napa'a's tax allotment to Kolo in 1998. He ought to have dealt with the town allotment there and then as well but he did not. He instead allowed the plaintiff to continue to keep and maintain the town allotment as his in all these 20 odd years. He has thereby by his conduct led the plaintiff to believe that the allotment was his and that it would be granted to him, and the plaintiff has relied upon the conduct to his detriment. The estateholder is properly estopped from denying that his conduct was such that he agreed that the allotment be lawfully granted to the plaintiff's.

[89] S.103(3) of the Evidence Act provides for such estoppel:

'103. (3) If a person, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and the latter was intended to act upon it in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented.'

I consider that the estateholder has, by allowing the plaintiff to keep and maintain the allotment as his, represented that he would consent to the grant of the allotment to him. The plaintiff has acted with such belief to his damage in all these years. The estateholder is estopped by these provisions of the Evidence Act from refusing to consent to the grant of the allotment to the plaintiff."

- 52 With respect to the primary judge, there was no evidence to support the conclusions in paras [86] - [89] quoted above.
- 53 It should be noted that contrary to Malakai's notice of appeal (ground 5), the power to grant the allotment lies with the Minister, not with Prince Tungi. The Minister is required to consult with the holder of the hereditary estate before making a grant (*Land Act*, s 8) but the decision as to whom a grant should be made rests with the Minister (*Land Act*, ss 19(2) and 43(2)(a)). The holder of an hereditary estate is required to admit into possession any person who has been granted an allotment upon his estate by the Minister if that person does not belong to another locality or hold a tax allotment elsewhere (*Land Act*, ss 34(1) and 35(1)).
- 54 There was no evidence as to what the view of the Minister would have been as to whom the allotment should be granted (or whether any grant should be made) if Viliami had been given the opportunity to be heard and if the true facts (as found by the primary judge) had been known to the Minister.
- 55 Prince Tungi's view as to whom the allotment should be made would be relevant, although not decisive, to the Minister's consideration. We agree with Mrs Tupou's submission that it is purely speculative as to what his Highness's view would have been had Viliami had the opportunity to make submissions and had all the facts been known.
- 56 Contrary to the primary judge's findings at [88] and [89], Prince Tungi is not estopped from refusing his consent to an application by Viliami for a grant.
- 57 The fact that the holder of the hereditary estate (either his Majesty or Prince Tungi) did not deal with Viliami's application for the town allotment in 1998 conveyed no representation that they consented to it. Viliami gave no evidence that he assumed that such consent had been given, nor that he altered his position to his detriment in reliance on that assumption.
- 58 Orders 3, 4 and 5 should be set aside.

59 The result of the appeal is that Viliami will be entitled to make his own application for a grant and advance submissions for the consideration of Prince Tungi and the Minister as to why a grant of the allotment should be made to him. Malakai can make a fresh application. The Minister will be obliged to consult with Prince Tungi and to consider his views on the competing applications. The ultimate decision will rest with the Minister. The Minister could properly have regard to the findings of the primary judge.

60 Having regard to the parties' mixed success on appeal, there should be no order as to the costs of the appeal.

61 Accordingly, the orders of the Court are:

- (1) Allow the appeal against orders (3), (4) and (5) of the Land Court of 16 December 2020.
- (2) Orders (3), (4) and (5) of 16 December 2020 be set aside.
- (3) Otherwise dismiss the appeal.
- (4) No order as to costs of the appeal to the intent that the parties bear their own costs.



Whitten P



Hansen J



Randerson J



White J

